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Supreme Court of the United States

OCTOBER TERM, 1979

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

RETAIL STORE EMPLOYEES UNION, LOCAL 1001,
RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

The petition for a writ of certiorari sets out the opinions below, the basis of this Court's jurisdiction, the statute involved and a statement of the case in a sufficiently clear and concise fashion to make a counterstatement of these matters unnecessary. (See Pet. 1-6.)

COUNTER STATEMENT OF THE QUESTION PRESENTED

Whether, under the rule stated in *Labor Board* v. *Fruit Packers,* 377 U.S. 58 (*Tree Fruits*) explicating § 8(b)(4) of the National Labor Relations Act, unions may lawfully engage in peaceful consumer picketing confined to a struck product wherever the product is sold, or whether unions may engage in such picketing only if the struck product does not constitute a predominant portion of the seller's business?

REASONS FOR DENYING THE WRIT

The National Labor Relations Board's petition carefully traces Rule 19 of this Court's Rules. The Board asserts that the Rule's criteria are satisfied in that the issue presented here has, in a previous case, been determined by this Court to warrant review, is a frequent subject of litigation, has resulted in a conflict in the circuits, and was resolved below to require a result Congress meant to avoid. Not one of these claims has merit. The petition is all form and no substance and should therefore be denied.

1(a). The Board concludes its petition by succinctly restating its dominant theme: "This Court recognized the need to resolve the issue [presented here] in granting certiorari in [*NLRB* v. *Local 14055 Steelworkers*, 429 U.S. 807 (*Dow Chemical*) which also presented that issue] and the same considerations warrant granting review here." (Pet. 12; see also *id.* at 6-7.) But the sole order entered in *Dow* reads in its entirety: "Certiorari granted, judgment vacated, and cases remanded with directions to remand to the National Labor Relations Board for reconsideration in light of intervening circumstances." (429 U.S. 807.) [1] (The "intervening circumstance" was the dissolution of the respondent union; on remand the circumstance was determined to moot the case. (See *Local 14055 Steelworkers (Dow Chemical Co.)*, 229 NLRB 302.) And the Board's reading of that order as "recogniz[ing] the need to resolve the issue" also presented here is wholly unwarranted.

[1] Thus, the statement at Pet. 6, n. 6 that "the Court, *after* granting certiorari in *Dow Chemical*, remanded the case for reconsideration*** " (emphasis supplied) is inaccurate.

By granting certiorari and simultaneously vacating the judgment below, the Court did not provide for resolution of the issue concerning the proper understanding of *Tree Fruits* presented by the Board and by the employers who petitioned for certiorari to review the *Dow* judgment, but provided only for resolution of the mootness issue raised by the respondent union. Indeed, in *Dow* the Board proposed that certiorari should be granted to decide the § 8(b)(4) issue and that "questions concerning the ongoing de facto existence of the Union should [thereafter] be resolved at the compliance stage of this case" (*Dow* Pet. 14),[2] and only in the alternative that certiorari should be granted and the matter remanded for consideration of the mootness issue. The Court, of course, chose the second of these alternatives.

(b) It is self-defeating for the Board to suggest "Nothing has occurred since the grant of certiorari in *Dow Chemical* to diminish the need for final resolution of the [§ 8(b)(4)] issue." (Pet. 6-7.) While it is true that next to nothing in the way of litigation has since occurred, that is a ground for denying the petition rather than for granting it.

In *Dow*, the Board represented that "The issue has now reached the courts of appeals in several cases, and it recurs frequently before the Board." (*Dow* Pet. 14.) This assertion is repeated *in haec verba* at p. 12 of the Board's present petition. The *Dow* petition (at p. 14, n.7) also listed six cases in which the Board's *Dow* decision had "been the basis, in whole or in part, for the issuance of unfair labor practice complaints." There is no similar support for the

[2] Petition For A Writ Of Certiorari To The United States Court of Appeals For The District of Columbia Circuit in No. 75-1858.

Board's present petition.

The facts are: this is the *only* case since *Dow* in which any court of appeals has decided the issue raised in the petition; only two of the cases noted in *Dow* ever reached the Board and both were decided without reaching the present issue;[3] and, as far as we are aware, there is at present only one case before the Board in which a complaint has been issued on the *Dow* theory.[4]

Unless the Board's *ipse dixit* is sufficient to establish that an issue "recurs frequently" and thus warrants this Court's attention, that criterion of this Court's Rule 19 has plainly not been satisfied.

2. There is likewise no merit to the contention that "the decision below conflicts with *American Bread* v. *NLRB*, 411 F.2d 147 (6th Cir. 1969)." (Pet. 10.) In *American Bread* the union, which was on strike against a bakery, was held to violate the Act by picketing restaurants which served bread as part of their meals, but did not sell bread separately. The Board argues that "the Sixth Circuit there stressed the probable result of the union's activity—'a boycott on all

[3] The two cases which were subsequently decided by the Board are *Millmen-Cabinet Makers Union Local 550, etc.*, 227 NLRB 196 and *Local 248 Meat and Allied Food Workers*, 230 NLRB 189. In the first of these the Board majority, though finding a violation, expressly disclaimed reliance on *Dow* (227 NLRB at 196, n. 1) and a dissenting member (who had been in the majority in *Dow*) concluded that the picketing was lawful under *Tree Fruits*. In the latter case, the majority did not mention *Dow* but held that the picketing did not adequately identify the struck product to satisfy *Tree Fruits* (230 NLRB at 189, n.2.)

[4] *Local 456 Teamsters and Chauffeurs, etc. (Carvel Corp.)*, 2-CC-1541. The Board obtained an injunction against the picketing pursuant to § 10(l) of the Act in *Bennett* v. *Teamsters Local 456*, etc., 459 F. Supp. 223, (S.D.N.Y.), discussed at p. 7, n. 6, *infra*.

the meals served in the establishments' (411 F.2d at 154)—rather than the threshold inability of potential customers to order bread-free meals." (Pet. 11.)[5]

But, as the Sixth Circuit said: "American Bread's output was integrated into the meals served by the restaurants and could not readily be recognized by the customers as to particular brand. In order for customers to express sympathy for the Teamsters' cause, they would necessarily have to refrain from ordering any meal served with bread or bakery products." (411 F.2d at 154.) And, that court stressed the struck product's integration into the restaurant's overall product by mentioning that point four times in the course of the two paragraphs of its opinion addressed to the meaning of *Tree Fruits*. (See 411 F.2d at 154.) One of these is the Sixth Circuit's statement of the Board's position, and another is that court's approving description of the holding in *Honolulu Typographical Union No. 37* v. *NLRB*, 401 F.2d 952 (C.A.D.C.). By thus following *Honolulu Typographical Union*, the *American Bread* court could not have considered that it was commiting the Sixth Circuit with respect to cases, like the present, which do not involve the struck product's integration into another. For, the *Honolulu Typographical* court had cautioned: "We need not decide in this case, nor do we intimate a view on, the question whether a secondary seller who sells only the struck primary product may be picketed even though the appeal necessarily amounts to a request that consumers cease all patronage." (401 F.2d at 956, n. 9.)

[5] The same contention was phrased more circumspectly in the Board's *Dow* petition (at p. 12): "The Sixth Circuit *seemed most influenced by* the probable result of the union's activity***" (emphasis added).

By the same token, the Board's further contention that the rationale of *Honolulu Typographical Union* "is inconsistent with the decision below" (Pet. 11, n. 9), and the Agency's even more ambitious claim that "the Board's holding follows *a fortiori* from that in *American Bread*" (Pet. 11), attribute to the late Judge Leventhal, who wrote *Honolulu Typographical,* and who joined the opinion for the court below in this case, an uncharacteristic inability to grasp the logic of his own reasoning. For ourselves, we cannot improve upon Judge Robinson's demonstration of the "ready" distinction between this case on the one hand and *Honolulu Typographical* and *American Bread* on the other:

> There is a decisionally-significant difference between a secondary employer's sales of a struck product in the form in which it leaves the primary employer, and sales by the secondary employer of goods or services into which the struck product has been so integrated as to lose its separate identity for all practical purposes. In the former situation, the primary employer and the secondary retailer cater to the same body of eventual consumers; the secondary retailer's immediate market is also the primary employer's ultimate market, and a union boycott can be structured to follow the struck product into that market without implicating any other product in the secondary employer's inventory. When, however, the struck product has been so blended with another product as to become an integral part of a materially different product, the primary employer and the secondary retailer no longer deal in the same product and share a common market. The struck product no longer has a market of its own, and it cannot be pursued into the market for the merged product without implicating its other components. The stark fact of the matter is that a discrete consumer boycott of the struck product, given its newly-acquired character, is simply not possible. See [137 U.S. App. D.C.] at 4, 401 F.2d at 955.

The decided cases vividly illustrate the contrast. In *Honolulu Typographical,* restaurant customers acceding to the union's supplication would have had to boycott meals—products, of course, not supplied by the primary employer, the newspaper. Similarly, in *American Bread Co.* v. *NLRB,* 411 F.2d 147 (6th Cir. 1969), in order to boycott a struck product—bread—customers of picketed restaurants would have had to pass up meals that included bread, thus effectively spreading the boycott to products not encompassed by the dispute with the primary employer. In the case at bar, however, consumers were neither required nor requested to boycott any neutral product in order to honor the picketers' appeal. Neutral secondary employers are legally susceptible to consumer picketing under *Tree Fruits,* but only insofar as the boycott of the struck product does not spill over into other phrases of the secondary enterprise. In true merged-product cases, however, the notion that the struck product is being followed to the consumer becomes so tenuous as to lose touch with reality. *Honolulu Typographical Union 37* v. *NLRB, supra* note 70, 131 U.S. App. D.C. at 4. 401 F.2d at 955. [Pet. 31a-32a, n. 93.] [6]

[6] So too, in *Teamsters Local 456, supra* (p. 4, n. 4, *supra*) the District Court in granting an injunction against consumer picketing because of its understanding that (10(l) limited its role to determining whether there is "some significant possibility that the picketing here did violate the Act" did not decide whether the Board or the Court of Appeals had been correct in *Dow Chemical.* That court did, however, expressly "reject the Board's contention that Carvel's [the primary employer's] products are so 'merged' with the products of other suppliers that the picketing here could

3(a). The petition (at p. 8) asserts that "*Tree Fruits* did not hold, as the court below implies, that struck product picketing can never transgress Section 8(b)(4)(ii)(B)." The court below did not so "impl[y]." That court, consistent with *Tree Fruits,* made it plain that picketing urging consumers not to buy any of the products sold by a retailer because that retailer sells a struck product does transgress the Act. (Pet. 25a-28a.) What the Court of Appeals did hold, again consistent with *Tree Fruits,* is that picketing addressed to consumers which is confined to urging them not to buy a struck product which is separately offered for sale does not transgress § 8(b)(4) simply because the establishment at which the picketing takes place deals predominantly in the product of the struck employer. As that court explained:

> In *Tree Fruits,* *** in order to determine whether picketing "threaten[s], coerce[s], or restrain[s]" [within the meaning of § 8(b)(4)(ii)(B)] the critical inquiry the Court undertook, simply and solely, was whether the "picketing is employed only to persuade customers not to buy the struck product." [377 U.S. at 72.] That was because, in that event, "the union's appeal is closely confined to the primary dispute," [*id.*] and while the picketing is extended to the secondary employer's premises, if the union's effort is successful the secondary employer's purchases from the primary employer "are decreased only because the public has diminished its purchases of the struck product." [*id.*]

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not be confined to the struck product as was the picketing in Tree Fruits" and on that basis stated the case to be "unlike *American Bread Company* v. *NLRB* (6th Cir. 1969) 411 F.2d 147." (See 459 F. Supp. at 231, n. 17.)

In this rationale we can perceive clearly enough the line of demarcation between what Section 8(b)(4)(ii)(B) leaves unaffected and what it plainly forbids—the line distinguishing "between picketing a secondary employer merely to 'follow the struck goods,' and picketing designed to res ult in a generalized loss of patronage . . . ." [*id* at 64 n. 7.] When the union's secondary picketing is no more than a request that consumers shun the struck product, any diminution of the commerce in the product between the primary and secondary employers is simply a reflection of the consuming public's reaction to the union's limited appeal, geographically extended as it was from the primary to the secondary site. But when the picketing is utilized to induce customers to foresake the secondary employer completely he "stops buying the struck product," the *Tree Fruits* Court reminds, "not because of a falling demand, but in response to pressure designed to inflict injury on his business generally." [*Id.* at 72.] As *Tree Fruits* declares, "[p]eaceful consumer picketing to shut off all trade with the secondary employer unless he aids the union in its dispute with the primary employer, is poles apart from such picketing which only persuades his customers not to buy the struck product." [*Id.* at 70.] In, the latter case, unlike the former, the union "does more than merely follow the struck product; it creates a separate dispute with the secondary employer." [*Id.* at 72.]

The test of "threaten[ing], coerc[ing], or restrain[ing]" which we thus distill from *Tree Fruits* is whether the challenged picketing confines its appeal to the struck product in order to reduce the primary employer's market therefor, or whether the picketing projects its force beyond these boundaries. [Pet. 24a-26a; footnotes omitted.][7]

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[7] In its response to the Court of Appeals' reasoning, the Board

(b) The Board's petition criticizes the Court of Appeals for establishing a "per se approach" whereas, according to the Board, *Tree Fruits* "call[s] for a careful weighing by the Board of disputed factual contentions" (Pet. 8-9). Since the Board, in its decisions and in its argument here posits a violation whenever picketing confined to the struck product occurs in a situation in which the struck product constitutes a substantial proportion of the retailer's business, *without regard to any of the other facts,* this characterization of the Board's legal theory is misleading. The further remark that "the approach of the court below would simplify that inquiry by focusing it solely on the language of the picket signs" (Pet. 9) is simply wrong.

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says that the lower court's "rationale fails to recognize that there are circumstances *** where the picketing, though confined to the struck product, would nonetheless have the prohibited effect of 'induc[ing] customers to foresake the secondary employer completely.' " (Pet. 8, n. 7.) But the Board cites nothing in *Tree Fruits* or anywhere else for the proposition that such an "effect" is "prohibited." And the well-settled law is that § 8(b)(4) does not interdict otherwise lawful picketing because of its effects:

> Section 8(b)(4)(B) is *** the product of legislative compromise and *** reflects a concern with protecting labor organizations' right to exert legitimate pressure aimed at the employer with whom there is a primary dispute. This primary activity is protected even though it may seriously affect neutral third parties. *Steelworkers* (Carrier Corp.) v. *NLRB,* 376 U.S. 492, 502 (1964); *Electrical Workers* (General Electric) v. *NLRB,* 366 U.S. 667, 673 (1961).
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> • • •
>
> Some disruption of business relationships is the necessary consequence of the purest form of primary activity. These foreseeable disruptions are, however, clearly protected. *Steelworkers* (Carrier), 376 U.S., at 496; *Electrical Workers* (General Electric), 366 U.S., at 682. [*NLRB* v. *Operating Engineers,* 400 U.S. 297, 303-304.]

There is not a word in that court's opinion which protects a union where the evidence is that, notwithstanding the language of the picket sign, the union was urging a boycott which extended beyond the struck product, for example, by orally urging the customers not to buy other products. More fundamentally, the approach which the Board urges here is that which has been taken in *Tree Fruits* by the Court of Appeals and which this Court *disapproved.* This is a point which Judge Robinson thought "bears repeating" (Pet. 30a), but which the petition ignores:

> The Board rested its *** conclusion solely on the proposition "that a successful boycott of Safeco insurance policies would predictably involve a virtual complete boycott of the land title companies." That, by the Board's estimate, was enough to transform the picketing into "coercion of neutral employers within the meaning of Section 8(b)(4)(ii)(B) of the Act." Our colleagues in dissent contend similarly that the financial consequences posed for the companies were alone sufficient to trigger the statutory picketing. We think these positions are totally at war with *Tree Fruits.*

The Court's test for coercion, as we have delineated, essentially is whether secondary consumer picketing strikes a blow only at the primary employer's ultimate market for the struck product, and not otherwise at the secondary employer's business. Neither the potential nor the predictable economic consequences for the secondary entrepreneur is the key, nor even a factor in the equation. The *Tree Fruits* Court's reasoning would seem to make that conclusion evident, and other considerations serve to drive it firmly home. In no wise was the *Tree Fruits* decision pitched on the

degree of financial impact, though the dissenting members of the Court called attention to the milieu we face today. It bears repeating that the *Tree Fruits* majority disagreed with the earlier view of this court "that the test of 'to threaten, coerce or restrain' for the purposes of this case is whether Safeway suffered or was likely to suffer economic loss." [377 U.S. at 72.] We find it difficult to imagine a more explicit rejection of the economic-impact theory of prohibited coercion.

In urging that the foreseeable economic consequences of the union's effort converted an appeal directed solely to the struck product into a prohibited call for a full boycott of the secondary employers' business, the Board and the dissent alike embrace the concept of coercion that *Tree Fruits* consigned to the graveyard. [Pet. 28a-30a; footnotes omitted.]

Thus, the "careful weighing by the Board of disputed factual contentions" (Pet. 8-9) must be addressed not to whether the retailer suffered economic injury because of the consumer picketing, but to whether the picketing is in fact strictly confined to persuading customers not to purchase the struck product.

CONCLUSION

Experience has shown that the issue raised by the petition arises infrequently. The decision below is not in conflict with that of any other court of appeals. And that decision accords with the governing precedent in this Court, which the court below examined with scrupulous care. In contrast, as that court observed, the Board proffers only an economic impact test which this Court has squarely re-

jected. The petition for a writ of certiorari should therefore be denied.

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